STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 10, 2008
v	No. 276518 St. Clair Circuit Court
TYIEE SAM BROWN, Defendant-Appellant.	LC No. 06-002119-FC

Before: Murray, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of second-degree criminal sexual conduct (CSC II), MCL 150.520c(1)(a), and sentenced, as a second habitual offender, to a prison term of seven to twenty-two and one-half years. We vacate defendant's convictions and remand the case for the entry of an order of discharge.

Defendant's conviction arises out of one count of first-degree criminal sexual conduct (CSC I), MCL 150.520b(1)(a). The complainant, an eight-year-old victim, testified that defendant, sexually penetrated her three times. Although defendant was charged with CSC I, the prosecutor, following the closing arguments, requested instructions on CSC II. Over defendant's objections, the trial court instructed the jury on CSC II, which the jury convicted him on.

Defendant contends that CSC II is not an "inferior," or necessarily included offense, of CSC I. Therefore, the trial court erred by instructing the jury on the cognate offense of CSC II, because he was only charged with CSC I.

Whether the court erred pursuant to MCL 768.32(1) to include a lesser degree that contains some but not all elements of the charged offense of a higher degree is a question of statutory interpretation that this Court reviews de novo. *People v Nyx*, 479 Mich 112, 116; 734 NW2d 548 (2007).

In *Nyx*, *supra*, the Court struggled with the same argument premised on the issue of whether CSC II is a necessarily included lesser offense of CSC I. In *Nyx*, the defendant was charged with CSC I, but following a bench trial, the trial court sua sponte convicted defendant of two counts of CSC II. The defendant appealed, arguing that the trial court erred by considering the cognate lesser offense of CSC II. The lead opinion in *Nyx* concluded that CSC II is a cognate

lesser offense, rather than a necessarily included lesser offense, of CSC I, and that MCL 768.32(1) barred the defendant's CSC II conviction.

CSC II requires "proof of one of several intents that are not always present when CSC I is committed. Thus, CSC II is not a necessarily included lesser offense of CSC I. Rather, it is a cognate lesser offense." *Nyx*, *supra* at 118 ns 12-14. Also, in *People v Lemons*, 454 Mich 234, 254; 562 NW2d 447 (1997), the Supreme Court clearly encompassed CSC II as a cognate lesser included offense of CSC I. The Supreme Court stated that the offense of "CSC II requires the prosecutor to prove 'sexual contact.' MCL 750.520c(1)." *Id*. at 253. Thus "it is possible to commit CSC I without first having committed CSC II." *Id*. at 254. While it is somewhat unclear from *Nyx* whether the Supreme Court will hold to its view in *Lemons* that CSC II is a cognate, rather than a necessarily included, lesser offense of CSC I, it certainly did not overrule *Lemons* on this point.

Some enlightenment is provided in *People v Cron*, 480 Mich 999; 742 NW2d 126 (2007), decided six months after *Nyx*. In *Cron*, the defendant was convicted of CSC II and CSC IV, which the Court of Appeals affirmed. The Supreme Court, relying on its earlier decision in *Nyx*, reversed the Court of Appeals to the extent that it affirmed defendant's conviction of CSC IV. In *Cron*, the Supreme Court once again reasoned, "the jury should not have been instructed on fourth-degree criminal sexual conduct, because that offense is not a necessarily included lesser offense of second-degree criminal sexual conduct." *Id*.

Like in *Nyx*, defendant in the instant case, was charged with CSC I and objected to the jury instruction on CSC II. The trial court erred in instructing the jury on the lesser cognate offense of CSC II. Therefore, the appropriate remedy under *Nyx*, *supra* at 136, is that defendant must be discharged. Accordingly, in light of our resolution of Issue I, it is unnecessary to address defendant's sentencing issue.

Vacated and remanded for the entry of an order of discharge. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Mark J. Cavanagh